U. S. CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

BOTANY WORSTED MILLS,
Libellant and Appellee,

vs.

JAMES KNOTT,
Respondent and Appellant.

BRIEF FOR APPELLEE.

Statement.

This is an appeal, by the respondent, from a decree of the District Court for the Southern District of New York, in admiralty, awarding the libellant $1,191.54 (including costs) for damages to cargo shipped on the steamship *Portuguese Prince* belonging to the respondent.

The facts connected with the shipment of the cargo and the cause and extent of the damage are not disputed, the question presented by the appeal being whether, upon the admitted facts, the respondent is exempted from liability for the damage, by reason of the exceptions in the bill of lading, or by the provisions of the third section of the Harter Act.

The libellant shipped 122 bales of wool, at Buenos Ayres, on the steamship *Portuguese Prince* in December, 1894, to be transported to New York. On

arrival, on March 30th, 1895, 52 of these bales were found to be damaged by sugar drainage, the damage amounting to $1,049.31.

It is admitted that the vessel was a common carrier (95) running in a line called the Prince Line, and trading regularly between the port of New York and the various ports in the Brazils and River Plata, carrying the products of those countries, and that in each of said ports there was a resident agent of the line, who made contracts for cargo and attended to its delivery and the collection of freight (150-152).

The libellant's wool, together with other wool belonging to the libellants, Winter & Smillie, was stowed in Number 1 between decks, about ten feet forward of a temporary wooden bulkhead which was not tight (Stipulation, p. 42). This bulkhead had been on the ship for some time and was moved about to suit the convenience of the cargo carried. The vessel left Buenos Ayres on December 12th, 1894, and proceeded to Santos, Rio, Bahia, Macio, Pernambuco, Para, Port of Spain, and thence (after calling at two other ports), to New York. At each of these ports cargo was taken in or discharged.

At Pernambuco, where the vessel arrived February 19th, 1895, wet sugar, from which there is always drainage, was stowed in the Number 2 between decks, aft of the temporary wooden bulkhead, which separated it from the wool.

The between deck was provided with scuppers, for carrying the drainage to the bilges, provided such drainage ran aft, as it would do when the vessel was trimmed by the stern, or on an even keel in smooth water. There was no provision for carrying off the drainage in case it ran forward.

The vessel left Pernambuco on February 24th, slightly by the stern (171) and proceeded to Para where she discharged a part of her cargo. On leaving that port on March 10th, she was trimmed *two feet by the head* (171). She proceeded to Port of Spain, where she loaded cargo, and proceeded on her voyage on March 18th, being then trimmed on

foot by the stern (171). It is admitted that there was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para; that the wool was damaged by the sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain, and that after the ship was again trimmed by the stern at Port of Spain, no sugar drainage found its way to the forward between decks (Stipulation, p. 42).

The defenses interposed are (1) that by the bill of lading "negligence of master and mariners * * * and all damage arising from the goods by stowage, or contact with, or by sweating, leakage, smell or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship * * * and whether before, or after or during the voyage" excepted. "This contract shall be governed by the law of the flag of the ship carrying the goods."

The answer further alleges, "if the different portions of the cargo were improperly stowed with reference to each other, then the said damage is within the exception of stowage and damage arising from the negligence of the officers, servants or stevedores of the vessel" (32).

(2) That the damage to the wool was due to "fault or error in the management or navigation of the vessel," and is within the exception of the third section of the Harter Act.

POINTS.

The Exceptions in the Bill of Lading.

I.

The language of the exceptions does not cover a loss resulting from stowage or contact with or leakage from other goods.

The principle is well established that in construing exceptions in a bill of lading, all doubtful language is to be resolved most favorably to the shipper, and that the exemption clause must be expressed so as to cover the precise exemption claimed; and, further, that general words following particularly enumerated exceptions do not extend the exemption to causes not specifically enumerated.

The language of the bill of lading is, "all damage *from the goods* arising by *stowage* or *contact with*, or by sweating, leakage, smell, evaporation *from them*." Whatever was intended to be expressed by this language it is apparent that the words "*from the goods*" must apply to the goods described in the bill of lading, and the words, "*from them*" at the end of the clause, clearly relate and apply to the goods themselves. The language used, therefore, does not cover damage caused by *other goods* than those described in the bill of lading. This appears more clearly by the language of the following clause which does except damage resulting from *certain other cargo*, viz: "Or from the leakage or flow of, or from contact with, the urine, manure, water or drainage of horses, cattle, sheep or other animals carried on the said ship," etc.

II.

The exemption from liability resulting from negligence of the owners is contrary to public policy, and therefore void.

The provisions in the bill of lading are one of the many forms of exemptions for loss caused by negligence, common in English forms of bills of lading, which the Federal Courts have uniformly refused to sanction.

The case falls directly within the rule laid down in

Lewisohn *v.* National S.S. Co., 56 F. R., 602.
The Guildhall, 58 F. R., 796.
The Glenmavis, 69 F. R., 472.

In each of the cases cited the shipment was made and the bill of lading signed in a foreign port, and exceptions almost identical with the one before the Court were held invalid.

The fact that the bill of lading contains the stipulation that the contract shall be governed by the law of the flag, furnishes no sound reason for the adoption of a different rule.

It is true that in the case of the Energia, 66 F. R., 604, Judge Lacombe said :

> " The case of the Montana, however, expressly
> " reserves for future decision cases where the
> " contract itself expressly provides that any
> " question arising under it should be governed
> " by the law of some specified foreign country."

But the question was not considered or decided in that case, since the charter party which was held to constitute the contract between the parties contained no such provision.

As has been pointed out by Judge Butler in the *Glenmavis* (*supra*), and by Judge Nelson in the *Iowa*, 50 F. R., 561, the insertion of the provision

as to the law of the flag is but an indirect attempt to obtain the benefit of the exemption of negligence condemned by our courts as contrary to public policy, by reason of the different rule prevailing in the English Courts.

In the *Glenmavis*, Judge Butler says (476):

> "The stipulation that the parties shall be sub-
> "ject to the laws of England is unimportant, as
> "it adds nothing to the implication which would
> "arise in its absence. The ship bore the English
> "flag, and the laws of Germany where the con-
> "tract was made, as well as those of England,
> "sustain such provisions. That the intent of the
> "parties in this regard is thus expressed is,
> "therefore, immaterial. In every instance
> "where the Courts have declared such stipula-
> "tion void, it has, of course, been against the
> "express agreement of the parties."

In the *Iowa*, 50 F. R., 561, where the bill of lading contained the same stipulation, Judge Nelson said (563):

> "The libellant is entitled to recover in spite
> "of the clause providing that all questions
> "arising under the contract shall be decided
> "according to British law. This seems to be an
> "attempt in an indirect way, to stipulate that
> "the shipowner shall be exempt from responsi-
> "bility for the negligence of his servants, since
> "the British law is supposed to uphold such
> "exemptions."

In the Montana, 129 U. S., 397–441, Mr. Justice Gray said:

> "The carrier and his customer do not stand
> "upon a footing of equality. The individual
> "customer has no real freedom of choice. He
> "can not afford to higgle or stand out and seek
> "redress in the Courts. He prefers rather to
> "accept any bill of lading or to sign any paper,

"that the carrier presents; *and in most cases* "*he has no alternative but to do this, or to* "*abandon his business.*"

It may well be questioned therefore how far the acceptance of a bill of lading containing the provision that the contract shall be governed by the law of the flag, can be considered as evidence of the intent of the shipper and cargo owner, that the English rule as to the right of the carrier to exemption from liability for negligence shall prevail.

III.

The exceptions in the bill of lading relating to stowage, they are in direct contravention of the provisions of the Harter Act and are therefore void.

The first section of the act prohibits the insertion in any bill of lading of any clause or provision whereby the owner "shall be relieved from liability for loss or damage, arising from negligence, fault or failure, in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge" and, by the Second Section of the Act, no covenant or agreement shall be inserted "whereby the obligation of the master, officer, agents or servants to carefully handle or stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

In the case of the Silvia, 68 F. R., 230, this Court said (233):

"Responsibility to the cargo owner who sues "in the courts of this country *cannot be cur-* "*tailed in any of the particulars prohibited by* "*the (Harter) Act.*" And

"Read as a whole the purpose of the Act "manifestly is, on the one hand, in the in- "terests of the public, to prevent carriers from "evading responsibility to exercise due dili- "gence in providing seaworthy vessels, *and in* "*the handling and care of the cargo.*"

THE HARTER ACT.

IV.

The damage to the libellant's cargo was the result of fault in "stowage of the cargo," and not in the "management of the vessel."

The argument of the appellant is, that as the sugar drainage could not reach the wool unless the ship was trimmed by the head, the cause of the damage was the faulty trim of the ship, and that the trim of the ship is properly comprised within the term "management of the vessel" as used in the Act.

While there is an apparent plausibility in the contention that the trim of the vessel is a matter which would fall within the term "management," a sufficient answer to this argument appears in the fact that the trim of the ship *alone* had nothing to do with the damage.

Before the change in the ship's trim had been made, the method of stowing the vessel's cargo had been such, that danger existed of damage by the sugar to the wool.

It was the duty of the carrier to use all reasonable care and skill in stowing, to prevent such damage, and the failure to do so is negligence for which the carrier is liable.

Abbott on Shipping, 12 Ed., p. 286:

"And care must be taken by the master

"* * * * * so to stow and arrange the dif-
"ferent articles of which the cargo consists
"that they may not be injured by each other,
"or by the motion or leakage of the ship."

Carver on Carriage by Sea, §95.
The Pharos, 9 F. R., 912.
Mainwaring *v.* The Carrie Delap, 1 F. R., 874.

The fact that the change in trim of the vessel was a *concurring*, or even the *proximate* cause of damage, as claimed by the appellant, ought not to relieve the vessel; for in cases arising under bills of lading, the *efficient*, as distinguished from the concurring or proximate cause of the damage, is looked to, and even when a peril of the sea or other excepted cause is proved, it is competent for the cargo owner to show that proper care in stowage was not exercised; and the loss is then deemed, in the sense of the law, a loss occasioned by the negligence in stowing.

Clark *v.* Bainewell, 12 How., 280.
The Sabioncello, 7 Benedict, 357.

It is not contended by the appellant that if the wet sugar had been stowed at Buenos Ayres, and the ship had left that port by the head, or if both the wool and sugar had been stowed at Para, the damage to the wool would be attributable to anything but negligence in the stowage or care of the cargo.

His argument is that the stowage of the wool at Buenos Ayres was proper; that the stowage of the sugar at Pernambuco was proper, because the vessel was then trimmed by the stern; and that the stowage of the cargo was therefore completed before the change in the trim of the ship took place.

Can the fact that the different cargoes were shipped at different ports and that the change in trim of the vessel occurred at a third port, change the cause of the loss from negligence in

"care of the cargo," to negligence in "management of the vessel"?

If so, in case other cargo had been stowed at Para, in the same compartment with the libellant's wool, under a similar bill of lading, and had suffered damage from the same cause, the owner of such other cargo would be entitled to recover the damage to his cargo, while the libellant would be remediless.

The statement of such a proposition carries its own refutation.

Admitting that the vessel on leaving the port of Para was, in the language of the brief for the respondent in the court below, "*unfitted to proceed with the wool and sugar*" by reason of change in her trim occasioned solely by the loading or discharge of cargo, and without reference to the safety or navigation of the vessel, is a different rule as to liability to be applied, than would be applied if the cargo had been stored at that port?

The object of the Harter Act as interpreted by this Court was to substitute in place of the strict warranty of seaworthiness, the obligation on the part of the owner to use due diligence.

But in the contract of the carrier, prior to the enactment of the Harter Act, was implied not only the warranty of seaworthiness at the commencement of the voyage, but also the stipulation that the vessel should be made seaworthy upon leaving any intermediate port.

> "But in the contract of the shipowner as "carrier is implied this stipulation, that should "the vessel become unseaworthy in the course "of the voyage, he must make her seaworthy, "if there be opportunity, or he must not pro- "ceed further."
>
> Machlachlan, Merchant Shipping, 419.

The intention of the Harter Act is to exempt the

vessel and owner from liability for error or fault after sailing and during the voyage.

Dobell *v.* SS. Rossmore Co. (1895), 2 Q. B., 408, Smith, L. J. (417).

> "I think that the meaning of the section is "that, if the shipowner by himself or his "agents uses due diligence to make the ship "seaworthy when she starts, he shall not be "liable for what happens afterwards *when the* "*ship is at sea and he has no more control* "*over her.*"

The *Portuguese Prince* was trading in a regular line between the several ports of Brazil and the River Plata and New York, and in each of said ports there was a resident agent of the line. What reason can be advanced for holding the owner to a lesser or different responsibility for the acts or omissions of his agents at the port of Para, than would be applied in case the vessel had left either Buenos Ayres or Pernambuco "unfitted to proceed with the wool and sugar?"

The vessel was equally under his control at each of these ports, and the same rule should be applied in determining his liability for faults or omissions of his agents at either of them.

V.

What is comprised within the term "Management of the Vessel."

The learned District Judge held that "where the regulation of the trim of the ship is designedly done and done primarily with reference to the ship, and for the benefit of the ship, or with a view to her sea going qualities," it is within the term management; and that the handling of the ship's

appliances with reference to the navigation or safety of the ship for the purposes of the voyage belong to the management of the ship (250-251).

So in the Sylvia (64 F. R. 607), affirmed by this Court, he held that the failure to close an iron shutter of a port hole was a fault in the management because the neglect consisted in the failure to use the appliances provided by the owner to put the ship in proper condition.

In the *Ferro*, (1893), Probate Division 38, where the bill of lading excepted "damage from any act or default of the pilot, master or mariners in the navigation or management of the ship," it was held that the stowage of rotten oranges with sound ones and placing sound boxes so that their ends rested on angle irons and were broken by pressure was not within the term "management."

Sir Gorrell Barnes, *J.*, said (page 46):

> "I am not satisfied that they (the words "'management of the ship') go much if it all be- "yond the word 'navigation.' Some things "may be suggested to which the word manage- "ment is perhaps applicable beyond that of "navigation."

In the recent case of the *Glenochil* (1896), Probate Division 10, where at the end of the voyage, before delivery of the cargo, it was found necessary in order to stiffen the ship, to fill the ballast tanks, and the sounding pipe and casing had become cracked during the voyage, so that in filling the tanks the water damaged the cargo, it was held that negligence in failing to examine the pipes before filling them was within the Harter Act, because the negligence was in the use of the ship's appliances for the ship's safety and was therefore within the term "management of the ship."

The distinction pointed out by Judge Brown in his opinion in this case was clearly recognized.

Sir Francis Jeune said: "The negligence consisted "in the mismanagement of part of the appliances

"of the ship; a mismanagement which arose be-
"cause it was intended to do something for the
"benefit of the ship, viz., to stiffen her, the necessity
"for stiffening arising because part of the cargo
"had been taken out of her."

In the case before the Court the change in the vessel's trim occurred at a regular port of call and was caused by the discharge of cargo from the after part of the vessel; it was not done for any purpose connected with the sailing or navigation of the vessel, her safety, or the proper completion of the voyage; she was in as seaworthy a condition by the head as if trimmed by the stern; it was not a misuse of any part of the ship's appliances or a failure to use the appliances furnished by the owner and was certainly not a fault in "navigation."

It was neglect in the care of the cargo in the same degree as if for the purpose of obviating the danger of damage to the wool, the cargo had been shifted at the port of Para, as should have been done (Saunders 129), and had been damaged by negligence during the operation.

VI.

The provisions of the first and second sections of the Harter Act control the interpretation to be given to the words "management of the vessel" in the third section, and having specifically prohibited the insertion of provisions exempting the carriers for negligence in the care of cargo and declared such provision, if inserted, null and void, it would violate the intention of the Act, as a whole, to extend the meaning of the words used in the third section to include negligence in the care of cargo.

It is an established principle of construction that a statute is to be construed as a whole, and its different provisions harmonized if possible, and that when particular provisions are contained in it the construction of general words is not to be extended so as to nullify the more particular provisions.

By the first section of the Act the insertion of any provision in a bill of lading, relieving the vessel or owner from "loss or damage resulting from negligence or failure in properly loading, stowage, custody, care or proper delivery of any and all lawful merchandise" is prohibited, and the second section declares it unlawful to insert any provision whereby the obligation of the master, &c, to carefully handle and stow her cargo and to care for and properly deliver the same shall be weakened, lessened or avoided. In the case of the Sylvia, this court held that one of the purposes of the Act as a whole was to prevent carriers from evading responsibility to exercise due diligence "in the handling and care of the cargo."

The attempt, therefore, to include negligence in stowing or care of cargo within the term "management of the vessel," as used in the third section, is manifestly repugnant to the intention of the Act to make the ship and owner responsible for such neglect.

In the *Glenochil*, 1896, Prob. D. 10, Sir Francis Jeune calls attention to the fact that the act is designed to "prevent exemption in the case of direct want of care in respect to the cargo and to permit exemptions in respect to the faults *primarily connected* with the navigation or with the management of the vessel and not with the cargo."

And by Sir Gorrell Barnes that "there will be found "a strong and marked contrast in the provisions "which deal with the cargo, and those which deal "with the management of the ship herself."

The fault which caused the damage in this case was *primarily connected with the care of the cargo*, viz.: the stowage of the wet sugar at Pernambuco

in proximity to the wool, without proper precaution against damage from the drainage, in case it found its way forward; the failure to shift and restow either the wool or sugar at Para, which was entirely practicable, and should have been done (Saunders 129), and leaving Para with the vessel unfitted to carry the wool and sugar safely. Fault in these particulars, it is submitted, are not within the meaning of the words "fault or error in the management of the vessel."

VII.

The decree of the District Court should be affirmed with interest and costs.

BLACK & KNEELAND,
Proctors for Appellees.

LAWRENCE KNEELAND,
Advocate.

No. 32

695

Supreme Court

Of the United States.

Brief of Kneeland for Oct.

32.

Filed Oct. 9, 1899.

OCTOBER TERM, 1899.

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OCT 9 1899
JAMES H. McKENNEY,
Clerk.

JAMES KNOTT,
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THE BOTANY WORSTED MILLS,
Libellant-Appellee.

Brief for Appellee.

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BOTANY WORSTED MILLS,
Libelant appellee.

BRIEF FOR APPELLEE.

STATEMENT.

The above cause comes before the Court by virtue of a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit.

The libel was filed in the Southern District of New York to recover damage to certain bales of wool, belonging to the libelant, shipped on the steamship "Portuguese Prince" at Buenos Ayres, in December, 1894, to be transported to New York.

The District Court decreed in favor of the libelant for $1,191.54, which decree was affirmed by the Circuit Court of Appeals.

There is no dispute as to the facts connected with the shipment of the wool or the cause and extent of the damage. It is admitted that the "Portuguese Prince" was a common carrier, running in a line called the Prince line, and trading regularly be-

tween the port of New York and various ports in Brazil and the River Plata, and that in each of said ports there was a resident agent of said line, who made contracts for cargo, attended to its delivery, to the collection of freight and to the vessel's business generally (p. 26).

At Buenos Ayres, between the 21st and 24th of December, 1894, 122 bales of wool belonging to the libelant were shipped on the "Portuguese Prince."

This wool, together with other wool belonging to Winter & Smillie, was stowed in the No. 1 between decks, about ten feet forward of a temporary wooden bulkhead which was not tight (17). This bulkhead had been in the ship for some time and was moved about to suit the convenience of cargo carried (p. 27).

The vessel left Buenos Ayres on December 25th, 1894, and proceeded to Santos, Rio de Janeiro, Bahia, Macis, Pernambuco, Para, Port of Spain, Grenada, St. Lucia and thence to New York (p. 29). At each of these ports cargo was taken in or discharged.

At Pernambuco, where the vessel arrived February 19, 1895, wet sugar, from which there is always drainage (pp. 20, 24), was stowed in the No. 2 between-decks aft of the temporary wooden bulkhead which separated it from the wool.

The between-decks was provided with scuppers for carrying the drainage to the bilges, provided such drainage ran aft, as it would do when the vessel was loaded by the stern, or on an even keel in smooth water. There was no provision for carrying off the drainage in case it ran forward (p. 20). The vessel left Pernambuco on February 24th, loaded slightly by the stern, and proceeded to Para, where she discharged a part of her cargo. On leaving that port on March 10th, she was loaded *two feet by the head.* She proceeded to Port of Spain, where she loaded cargo and proceeded on her voyage on March 18th, being then loaded one foot by the stern (p. 29).

The following stipulation was entered into (p. 28).

> "It is stipulated between the parties as follows: Wet sugar was stowed in No. 2 'tween decks at Pernambuco. There was a wooden bulkhead not tight between this place and the forward or No. 1 'tween decks in which libelant's wool was stowed. There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log, which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain none of the drainage from the sugar found its way into the forward 'tween decks. The Court may draw inferences."

Upon arrival at New York, 55 bales of the libelant's wool were found to be damaged by sugar drainage, such damage amounting to $1,049.31.

The defences interposed are:

(1) The following provisions contained in the bill of lading:

> "Negligence of master or mariners * * * and all damage arising *from the goods* by stowage, or contact with, or by sweating, leakage, smell, or evaporation from them. * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind and whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, master, officers, mariners, crew, stevedores, engineers and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the ship-owner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, pro-

vided all reasonable means have been taken to provide against such unseaworthiness * * * * excepted."

"*This contract shall be governed by the law of the flag of the ship carrying the goods.*"

(2) That the damage to the wool was due to "fault or error in the management or navigation of the vessel" and within the exemption of the third section of the Harter Act.

The District Court found.

(1) That "the primary cause of the damage was negligence and inattention in the loading or stowage of the cargo," and that the exemption from liability for loss or damage arising through "fault or error in the management of the vessel" provided in the third section of the Harter Act, did not extend to such a case (p. 46).

(2.) That such negligence in loading fell within the first section of the Statute expressly prohibiting the insertion of any stipulation in bills of lading relieving the vessel or owners from liability for loss or damage "arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge," and declaring that all words or clauses of such import "shall be null and void and of no effect" (p. 48).

(3.) That the provision that the contract should be governed by the law of the flag, did not validate the exception in the bill of lading of liability for negligence in stowage (p. 49).

The Circuit Court of Appeals held as follows (p. 54):

(1.) They concurred in the finding of the District Judge that the damage to the wool was not due to "fault or error in the management or navigation of

the vessel," but to negligence in loading or stowage of the cargo.

(2.) A majority of the Court concurred in holding that the exception in the bill of lading of liability for "damage by stowage * * * though caused by the negligence of the master" notwithstanding the provision that the contract should be governed by the law of the flag, was invalid being contrary to public policy.

(3.) Found it unnecessary to decide whether the prohibition of the Harter Act applied to a bill of lading issued at a foreign port.

(4.) Affirmed the decree of the District Court, Lacombe, Circuit Judge, concurring in the result (p. 56).

POINTS.

I.

The cause of the damage to the libelant's wool is not covered by the exception in the bill of lading.

The language of the bill of lading is "all damage arising *from the goods* by stowage, or contact with, or by sweating, leakage, smell or evaporation *from them.*"

Whatever was intended to be expressed by this language, it is apparent that the words "*from the goods*" must apply to the goods described in the bill of lading and the words "*from them*" at the end of the clause also clearly relate and apply to the goods themselves.

The language used, therefore, does not cover damage *to* the goods caused by stowage or by contact with or leakage *from other goods.*

This appears more clearly by the language of the following clause, which does except damage resulting from contact with or leakage from *certain other* cargo, viz.: "or from the leakage or flow of, or from contact with, the urine, manure, water or drainage of horses, cattle, sheep or other animals carried on the said ship" etc.

In *The Bitterne*, 35 Fed. Rep., 927, Judge Benedict, in construing a clause in a bill of lading exempting the vessel from liability for "wastage, leakage, breakage, or straining of packages or injury to wrappers however caused," held that such clause did not exempt the ship-owner "from liability for breakage of packages other than the packages named in the bill of lading."

Counsel for the appellant, in his brief (pages 5 and 8) apparently recognizes the defect in the language of the exception, and seeks to substitute the preposition "*to*" for the preposition "*from*" in the clause in question.

The principle is well established, however, that in construing exceptions in bills of lading all doubtful language is to be resolved most favorably to the shipper, and that the exemption clause must be expressed so as to cover the precise exemption claimed; and further, that general words, following particularly enumerated exceptions, will not extend the exemption to causes not specifically exempted.

Carver on Carriage by Sea, Section 77.

> "In construing exceptions in a bill of lading to the ship-owners' liability, the rule is to be remembered, that where the words leave the intention in doubt they are to be construed against the person for whose benefit they have been introduced. Their meaning is not to be extended to give him a protection for which he has not bargained in clear terms."

Compania la Flecha v. *Brauer*, 168 U. S., 104, 118.

> "Exceptions in a bill of lading or charter-party, inserted by the ship-owner for his own

benefit, are unquestionably to be construed most strongly against him."

See also the *Caledonia*, 157 U. S., 124–137.

Taylor v. *Liverpool & Gt. Western Steam Co.*, L. R. 9 Q. B., 546.

Exception—"Robbers and thieves."

Lush, *J.* (550). "It is not, I think, reasonable to suppose where the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. *The shipowner must protect himself if he intends this by the use of unambiguous language.*"

In *Burton* v. *English*, L. R., 12 Q. B. D., 218, the charter-party under consideration provided that deck cargo should be "at merchant's risk."

BOWEN, *J.* (p. 224): "It is difficult at first sight to free oneself from the idea that those who drew this contract were thinking of the jettison of a deckload of timber. But still, what is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favor, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words."

It is urged, therefore, that it is not admissible to speculate as to whether or not the respondent intended, by the language of the bill of lading, to stipulate for exemption from liability for damage *to* the goods in question by stowage, or by contact with or leakage *from other goods*, but that he must establish a clear and unambiguous stipulation excepting the particular cause of damage proved.

II.

The exception in the bill of lading of damage by negligent stowage is in direct contravention of the provisions of the Harter Act, and is void.

Since the passage of the Harter Act, clauses in bills of lading, like the one relied upon by the appellant, are invalid not only as contravening public policy, but their insertion is expressly prohibited by the statute which also declares that they shall be "null and void and of no effect."

The first section of that Act provides:

> "That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability from loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."
>
> SECTION 2.—"That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

It cannot be, and, in fact, is not contended that the exception in the bill of lading of damage "by stowage * * * occasioned by the wrongful act, default, negligence or error in judgment of the owners, masters, officers," etc., is not such a clause as is prohibited and declared unlawful, null and void by the sections of the Statute above quoted.

The contentions of the appellant are:

(*a.*) That the first and second sections of the Act do not apply to contracts made abroad (Appellants' Brief, p. 32).

(*b.*) That the insertion of the provision that the contract should be governed by the law of the flag, rendered the Harter Act inapplicable. That by accepting a bill of lading with such provision, the shipper contracted himself out of the benefits of the statute (Appellant's Brief. p. 34).

(*a.*) In the case of The *Silvia*, 171 U. S., 462, this Court held that the *third* section of the Act applied both in terms and intent to foreign vessels and to a shipment made at a foreign port.

The language of the first and second sections is equally applicable to the case of such a shipment.

Both sections apply to vessels transporting merchandise "*from or between ports of the United States and foreign ports.*"

Had the preposition "from," alone been used the construction of the appellant might find some support; but the use of both prepositions, "*from or between*," clearly and unmistakably extends the language of the statute to all vessels engaged in foreign trade whether bound to or from ports of the United States.

The act in question as originally passed by the House was avowedly intended to affect vessels engaged in foreign trade. The Chairman of the Committee on Interstate and Foreign Commerce (Mr.

Lind) on reporting the bill to the House, stated at the close of his report:

> "As thus amended the bill relates solely to cargoes of vessels in the foreign trade."

Vol. 24 Congressional Record, p. 149.

In the bill, as reported and as originally passed by the House, the language of the first and second sections was the same as that contained in the final enactment, *viz.*, "from or between ports of the United States and foreign ports"; while in the third section the words originally used were "between ports in the United States of America and foreign ports," amended upon final passage, by substituting the words "to or from any port in the United States of America."

Appellant argues (page 32, Appellant's Brief) that if the original phrase was understood to cover vessels bound from abroad to ports in the United States, the amendment of the third section during the passage of the act was unnecessary; and that the fact that it was made indicates an intention to give to the third section an application to vessels coming from abroad, and to the first and second sections, left in their original form, a narrower application, namely, to contracts made in this country only.

This argument, however, is based upon a misconception of the reasons for changing the language of the third section. As already stated, all the provisions of the Act as originally passed by the House, related solely to vessels in the foreign trade.

In the Senate, the third section was amended so as to extend the exemption from liability for damage resulting from fault or error in navigation or management to domestic vessels, and it was to effect this purpose that the words "to or from any port in the United States of America" were substituted for the words "between ports in the United States of America and foreign ports."

When the bill with the Senate amendments came again before the House, Mr. Buchanan, of New

Jersey, called attention to the fact that the words "foreign ports" had been stricken out of the third section, and asked "whether that would not have "the effect of making the bill apply to vessels ply- "ing between do mestic ports."

Mr. Lind: "Mr. Speaker, the members of the House will understand that this bill, as it originally passed the House, simply related to vessels engaged in the foreign carrying trade. It prohibited these vessels, their masters, agents, or charterers from inserting in any bill of lading any provision which exempted them from responsibility arising from their own negligence. The bill as amended by the Senate adheres to that principle; but there is this change in the Senate bill to which I wish the attention of the House, and also particularly ask the attention of the gentleman from New Jersey, who asked this question * * * * One important new feature is presented by the Senate amendments. As the law now stands American vessels are subjected to certain hardships, from which they cannot exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper, and make provision against any liability on its own part, for the negligence of its masters or owners; *but the object of this bill is to limit this right.* An American vessel cannot make any such contract, or absolve itself for any such liability for the reason that it is always amenable to the Federal Courts, and the Federal Courts here have always held that contracts of that character are against public policy.

Those who are more familiar with the matter of ocean navigation than I, especially the gentleman from Maine (Mr. Dingley) have agreed with me, as it was well demonstrated in the Senate Committee at the hearings which I attended, that the law as applicable to shipping in the United States ought to be somewhat more liberal than it is at present. Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the

high seas in stress of weather or in storms, where every man is worn out with watching, if a man falls asleep on the watch or commits any fault in navigation whereby injury results, the master, owner, or charterer is held responsible under the law. To this extent the bill relieves domestic shipping from these burdens. It provides that where the owner or owners, the charterers or the master have exercised due diligence in properly equipping, manning and stowing, making the vessel in all respects seaworthy——

Mr. Dingley: "And properly navigating——

Mr. Lind: "And properly navigating, then they shall not be liable for faults or errors of navigation solely. *Now this is absolutely the only new feature of the bill except one other.*"

Volume 24, Congressional Record, p. 1291-2.

Appellant's further contention that the provision of the statute imposing a penalty for its violation, could not be enforced in the case of a contract made abroad, and that foreign contracts are, therefore, not to be considered within the provisions of the Act, is likewise unsound.

We by no means accede to the appellant's contention that it would not be competent for Congress to prescribe such penalty. in the case of a contract made abroad in violation of the statute, where such contract is to be performed by the delivery of merchandise within the United States; or for the Court to enforce the penalty upon the actual arrival of the vessel within its jurisdiction.

United States v. *Craig* 28 Fed. R., 795.

Yet even assuming that the penalty prescribed for a violation of the statute could not be enforced in such a case, the inference sought to be drawn therefrom by the appellant is not warranted.

The statute does not leave the illegality and invalidity of such a contract to be inferred from the imposition of a penalty. It expressly declares such

contracts unlawful, and that they shall be "null and void and of no effect."

A complete remedy and protection to the owner of cargo shipped from a foreign port, irrespective of the penalty, is therefore provided by the act.

In the case of a shipment from a port in this country to a foreign port, where the foreign law might be invoked by the shipowner as validating the contract made in violation of the Act, the penalty is admittedly enforceable. On the other hand, in the case of a shipment made abroad, the shipper may safely rely upon the provisions of the statute declaring void such of the provisions of the bill of lading as are in contravention thereof.

The construction of the fourth and fifth section of the act with the first and second sections furnish no support, therefore, to the contention that the last named sections have no application to contracts made abroad.

(*b*) The argument that by the insertion of the provision as to the law of the flag all applicability of the Harter Act was done away with, and that either party could contract himself out of the benefit of the statute, if advanced seriously, seems to rest upon a failure to recognize the distinction between a benefit conferred by statute and a statutory prohibition.

Reduced to plain language such contention means that the shipowner may make just such a contract as the statute expressly and in terms forbids.

It is true that the Courts have held that the shipowner may by a special contract with the shipper waive those provisions of the act which relax his ordinary obligations. (The *Silvia*, 68 F. R., 230 233; *Hine* v. *N. Y.& Bermudez Co.*, 68 F. R., 920-923), and the other cases cited by the appellant (p. 34-35 of his brief) clearly support such holding.

The principle that "every man may renounce a benefit introduced in his own favor" has, however, this important limitation—that he cannot enter into a valid prospective agreement to waive rights which

the law has declared public policy requires should exist.

Kneettle v. *Newcombe*, 32 N. Y., 249-252.

> " Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtors' property, without exception, might be taken on the execution in case of default. By the statutes exempting certain property, the Legislature in effect determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property, of limited value, should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established."

This limitation is clearly recognized in the case of *Griffith* v. *Earl of Dudley*, L. R. 9 Q. B. D., 357, cited on appellant's brief.

The Court there held that the contract, waiving the provisions of Section 1 of the Employee's Liability Act, was not against public policy; and the distinction between that case and a case where the statute contains an express prohibition is clearly indicated by the language of Field, *J.*, (p. 366):

> "I do not think the words of the Act go far enough to compel the construction that the express contract by the workman against the operation of the Act should not take effect. In all cases referred to in argument, in which the Legislature has intended to enact that a person shall not be allowed to contract himself out of an act of Parliament, very express words have been used."

It would be difficult to suggest or frame more express words of prohibition than are contained in the first and second sections of the Harter Act.

III.

The exception in the bill of lading of liability for damage resulting from negligent stowage is invalid as contravening public policy, and is not validated by the stipulation that the contract should be governed by the law of the flag.

The District Judge and a majority of the Circuit Judges concurred in holding that the exception in the bill of lading of liability for damage resulting from negligent stowage, being against the public policy of this country, was invalid, notwithstanding the provision that the contract should be governed by the law of the flag.

It was from the finding of the Court upon this question, that Judge Lacombe, although concurring in the result, dissented; and the subsequent decision of the same Court in the case of *The Kensington* (94 Fed. R., 885) indicates the grounds upon which such dissent was based.

Judge Lacombe speaking for the Court in that case, stated:

> "The claimant further contends that it should have the benefit of the provision in the contract of carriage exempting it from liability for the act, neglect, or default of its servants; such stipulation being authorized by the Belgian law. In reply it is sufficient to refer to Worsted Mills *v.* Knott, 27 C. C. A., 326, 82 Fed., 471, in which a majority of this Court held that such a stipulation, being against the public policy of this country, was not enforceable by its courts. We are unanimous in the opinion that it cannot be enforced where both parties to the contract are citizens of the United States, and the place of the completion of the contract is within this country."

It is clearly to be inferred from the opinion of the learned District Judge that he considered the provisions of the first and second sections of the Harter Act applicable to a bill of lading issued at a foreign

port; a question which the Circuit Court of Appeals found it unnecessary to decide. The question whether such a shipment is within the meaning and intent of the first and second sections has already been argued, and if the libelant's contention upon this point be sustained, the question whether such stipulations are to deemed invalid upon grounds of public policy becomes immaterial, in view of the statutory declarations that all stipulations of such import shall be null and void and of no effect.

The question as to the effect of the insertion in bills of lading of a provision that the contract shall be governed by foreign law, upon the carrier's stipulation for exemption for damage resulting from negligence, has been twice argued before this Court, but not decided (*Compania* v. *Brauer*, 168 U. S.. 104). The *Victory* and *Plymothian*, 168 U. S., 410).

Since the decision of this Court in *Liverpool Steam Navigation Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, it is no longer open to question that stipulations by a carrier for exemption from liability for negligence are invalid as contravening the public policy of this country and will not be enforced by the courts.

It is claimed, however, that in that case the Court merely decided that the contracts or bills of lading, there under consideration, were American and not English contracts; and that the decision furnishes no support to the contention that such stipulations should be held invalid where (1) the contract was made abroad, or (2) when it contains an express provision that it shall be governed by foreign law.

Subsequent to this decision the question has been presented to the lower courts in cases where one or both of these facts, claimed to constitute distinctions, were present, and in every case the courts have refused to enforce the stipulation for exemption, finding authority for such decisions in the opinion of this Court in the case cited.

The *Iowa*, 50 Fed. R., 161.

(Judge Nelson, Dist. of Mass.). Contract made

here, providing that it should be governed by British law.

The *Energia*, 56 F. R., 124.

(Judge Brown, S. D. of N. Y.). Contract made here, providing that it should be governed by British law).

Lewisohn v. *Nat'l S. S. Co.*, 56 F. R., 602.

(Judge Benedict, East. Dist. of New York). Contract made abroad providing that it should be gov. erned by law of flag (British).

The *Hugo*, 57 Fed. R., 403.

(Judge Brown, South. Dist. N. Y.) Contract made here providing that it should be governed by British law.

The *Guildhall*, 58 F. R., 796.

(Same Judge). Contract made at Rotterdam and stipulation for exemption valid there.

The *Glenmavis*, 69 F. R., 472.

(Judge Butler, E. D. Pa.) Contract made at Hamburg providing that it should be governed by the law of flag (British).

The opinions of the learned District Judges in the cases cited state so clearly and fully the reasons and principles leading to their determination of this question, as to leave little or nothing to be added to what they have there stated.

Opposed to these decisions is that of Judge Morris in the *Oranmore*, 24 F. R., 922, affirmed by Judge Bond in December, 1885. Both of these decisions it should be noted were rendered before the decision by this Court in the *Montana* case. The question discussed in the opinion appears to be whether in view of the provision that all questions under the contract were to be determined by English law in England, it was intended that the bill of lading should be enforced as an English contract, notwith-

standing the fact that it was made here; while the question whether it was consistent with the public policy of this country to enforce such a contract in our Courts is not referred to.

The argument of the appellant in support of his contention that the stipulation for exemption is valid and enforceable is, first, that parties to a contract may lawfully stipulate that their obligations thereunder shall be governed by, and the contract itself interpreted according to a law different from that of the forum, and that where an express provision for such foreign law is made, it will be enforced.

This general proposition may be admitted, with the limitation, that a Court which is called upon to enforce and interpret the contract is bound to consider and inquire whether any obligation or provision, sought to be enforced, is in violation of the express law or declared policy of the forum, and particularly where the whole or any part of such contract is to be performed within its jurisdiction.

The question involved in the present case is, therefore, that presented by the second proposition advanced by the appellant, namely, whether sufficient reason appears for refusing to apply the British law in determining the rights of the parties under the bill of lading.

In considering the arguments advanced in support of appellant's contention upon this point, the following facts should be borne in mind.

Although the provision in the bill of lading is that the law of the flag (British) should govern, no part of the contract of carriage was to be performed within British jurisdiction.

The contract was made at Buenos Ayres.

The change in trim which caused the damage was made in Brazil and the damage occurred there or on the high seas.

There is no proof in the case of either the Argentine or Brazilian law, which must, therefore, be assumed to be the same as our own.

The contract was to be performed in part in this country.

The considerations advanced by the appellant are:

(*a.*) That the contract was signed abroad.

This fact alone does not aid his contention, as in the absence of proof to the contrary it must be assumed that the stipulation for exemption from liability for damage caused by negligent stowage was invalid by the Argentine law. He is forced, therefore, to fall back upon the provision for the law of the flag as excluding the *lex loci contractus.*

(*b.*) That the parties to the contract were foreigners.

While by the bill of lading Wantge & Schlief, of Buenos Ayres, appear as the shippers of the cargo, it is shown that the libellant, a domestic corporation, was the owner of the goods at the time of shipment (Record, p. 7).

(*c.*) That the stipulation for the law of the flag was reasonable as tending to provide uniform rules for the determination of controversies possibly arising at the ports of different countries included within the voyage; and that it was not designed to evade our law on the subject of negligence exemptions.

This contention would be entitled to consideration were it attempted to disregard the stipulation for the law of the flag *in toto*, as for instance in the case of a bottomry bond cited by appellant. The validity of the stipulation for the law of the flag, by itself, is however not attacked, but its attempted application, to bolster up an invalid exception of negligence, is.

The reason for its introduction may, or may not, have been a design to evade our law; its attempted application undoubtedly is.

The contention as to the desirability and advantage of uniformity is open to this criticism in this case.

The bill of lading in this case contains the following clause:

> "With liberty * * * to substitute or transship the goods by any other steamer before the commencement of or at any period of the voyage."

Under this provision of the bill of lading what assurance had the *shipper* of the law which was to govern the transportation of his cargo?

Before the commencement of the voyage the "Portuguese Prince" might have transferred the cargo to a steamer of any nationality, and the "law of the flag of the ship carrying the goods" might be that of any one of a dozen different nations.

(*d.*) That there is nothing in our public policy to prohibit parties contracting abroad from providing that their obligations touching matters to be done without our jurisdiction shall be governed by foreign law.

It is submitted that it is upon the determination of this question that the appellant's whole contention depends.

The learned District Judge in his opinion (p. 49) set forth in the following concise language his conclusions upon this point, the reasons for which he had more elaborately stated in his previous decisions in The *Brantford City*, The *Energia*, The *Hugo*, and The *Guildhall*.

> "Foreign law is administered only upon principles of comity. This cannot be allowed to subvert in our courts our own positive law founded upon public policy, as respects contracts to be performed in part within our jurisdiction and in part upon the high seas."

In *Railway Co.* v. *Lockwood*, 17 Wall., 357, this Court held that it was contrary to the interests of the whole public that carriers should be permitted to stipulate for exemption from liability for negligence; that the public interest—the interest of the State—is involved, before which the liberty to con-

tract of the shipper and carrier must give way. The principle laid down is therefore based upon the broad ground of public policy as distinguished from the right of, or injury to, the individual shipper.

The attempt to limit the application of the decision in this case to "railway cases," upon the ground that the greater freedom and competition in maritime commerce removes the element of oppression, was met by the language of this Court in The *Montana*, 129 U. S., 397-441, applying the language of the *Lockwood* case to a case of ocean carriage.

> "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading or sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

In view of the fact that the refusal of this Court to enforce such stipulations, is based upon the public injury which would result therefrom, upon what grounds can it be properly held that the carrier may, by inserting in his contract a stipulation that a foreign law shall govern his obligation to deliver cargo here, obtain the exemption to the public detriment?

In the *Glenmavis*, Judge Butler said (476)

> "The stipulation that the parties shall be subject to the laws of England is unimportant, as it adds nothing to the implication which would arise in its absence. The ship bore the English flag, and the laws of Germany where the contract was made, as well as those of England, sustain such provisions. That the intent of the parties in this regard is thus expressed is, therefore, immaterial. In every instance where the courts have declared such stipulations void, it has, of course, been against the express agreement of the parties."

In the *Iowa*, Judge Nelson in referring to a similar stipulation said (563)

> "The libellant is entitled to recover in spite of the clause providing that all questions arising under the contract shall be decided according to British law. This seems to be an attempt in an indirect way to stipulate that the ship owner shall be exempt from responsibility for the negligence of his servants, since the British law is supposed to uphold such exemptions."

The public policy of this country would be as much violated by permitting such exemptions in the case of shipments to this country as in the case of shipments from our ports.

Even had the appellant been able to prove that the exception relied on was valid by the Argentine law, the Court should not enforce it.

Oscanyan v. *Arms Co.*, 103 U. S., 261, 277.

> "Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. *But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.*"

Thatcher v. *Morris*, 11 N. Y., 438.

> "If however a contract is made and to be performed without the State, and is valid by the laws of the State where it is made and to be performed, it would be upheld by the Courts of this State, out of respect to the foreign law, and upon principles of comity by which courts are governed, if not contrary to the principles of morality *or public policy*, although such contract would be illegal within this State."

The principle laid down in the English cases is the same.

Although the English courts may differ from ours as to what contracts are to be deemed to contravene public policy, and may be inclined to restrict the class of contracts subject to such objection, nevertheless, when it has once been determined that a contract is contrary to public policy, they have refused to enforce the same, notwithstanding the fact that they were valid where made, when any part of same was to be performed within the jurisdiction.

Hope v. *Hope*, 8 De Gex M. & G., 731.
Roussilon v. *Roussilon*, 14 Ch. D., 351, 369.
Hamlyn v. *Talisker*, (1894) A. C., 202, 209, 214.

IV.

The damage to the cargo did not result from "faults or errors in navigation or in the management of said vessel" and was not within the provisions of the 3d Section of the Harter Act.

Both of the Courts below agreed in holding that the damage to the wool was not due to fault or error in the management or navigation of the vessel, but to negligence in the loading or stowage of the cargo.

The contention of the appellant is that the negligence consisted in failing to keep the ship trimmed by the stern so that the sugar drainage would flow aft to the scuppers, and that negligence in this respect was "fault in management."

His argument is that the original stowage of the wool at Buenos Ayres was proper; that the stowage of the sugar at Pernambuco was proper, the ship then being trimmed by the stern; and that the loading and stowage of the cargo was therefore

completed before the change in the trim of the ship took place.

It is not contended that, if the wet sugar had also been stowed at Buenos Ayres and the ship had left that port by the head, or if both the wool and sugar has been stowed at Para, the damage to the wool could be attributed to anything but negligence in the stowage or care of the cargo.

But can the fact that the different cargoes were shipped at different ports and that the change in the trim of the vessel occurred at a third port, change the cause of the damage from negligence in stowage or care of the cargo to "negligence in management"? If so, in case other cargo had been stowed at Para in the same compartment with the libelant's wool, and had suffered damage from the same cause, the owner of such other cargo would be entitled to recover the damage to his cargo, while libelant would be remediless.

The cause of all the damage would be the same, yet in the one case the appellant would term it fault in stowage and in the other fault in management.

(*a.*) The manifest intention of the Harter Act is to hold the ship-owner to the exercise of the utmost diligence in providing and loading his vessel so she may carry the cargo safely, and the exemptions which it provides are conditional upon the fulfilment of this obligation.

In *Dobell v. SS. Rossmore Co.* (1895). 2 Q. B., 408, 417, the Court, referring to the 3d Section of the Statute, said:

> "I think that the meaning of the Section is that, if the ship-owner by himself or his agent uses due diligence to make the ship seaworthy when she starts he shall not be liable for what happens afterwards when the ship is at sea and when he has no more control over her."

The "Portuguese Prince" (owned in England) was trading in a regular line between New York

and the several ports of the River Plata, Brazil, and the West Indies, loading and discharging cargo at each of said ports, and in each of said ports there was a resident agent of the line.

At which of said ports did the obligations of the owner or his agents cease?

What reason can be advanced for holding him to a less or different responsibility for the acts or omissions of his agents at the port of Para, than would be applied in case the vessel had left either Buenos Ayres or Pernambuco in an unfit condition to carry the cargo safely?

The vessel was equally under his control at each of these ports, and he should be held to the same measure of responsibility for faults or omissions of his agents at either of them.

It is part of the carrier's duty so to stow and arrange the different articles of which the cargo consists, that they may not be injured by each other; and as said by the learned District Judge (p. 46 of Record):

> "The wool should not have been stowed forward of the wet sugar unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship did not get down by the head."

Such changes in trim were to be anticipated and had, indeed, taken place before either the wool or sugar were loaded. The vessel had left Montevideo *two inches by the head*, Buenos Ayres *six inches by the stern*, Santos *four feet by the head*, Rio *four feet six inches by the stern* and Pernambuco *ten inches by the stern*, before arriving at Para (Respondent's Exhibit D, page 29).

Can the failure to provide against the consequences of the vessel's trim while at and on leaving the port of Para be deemed any the less negligence in the stowage or care of the cargo, than if, for the purpose of preventing damage to the wool, the cargo had been shifted at the port of Para (as should

have been done, Record, p. 21) and had been damaged by negligence during the operation?

(*b.*) The term "management" as used in the Harter Act should not be held to cover or include any act or omission primarily connected with the care of the cargo.

The words of the statute are "faults or errors in navigation or in the management of said vessel."

While the word "navigation" has been the subject of judicial definition, there appears to be an absence of a definite and comprehensive definition of the word "management."

It has, however, been held, in interpreting the terms navigation and management, as used in the Harter Act, and in bills of lading prior to its enactment, that, by the addition of the word "management," it was intended to extend the exemption merely to certain faults akin to faults in navigation which might not fall within a strict definition of the latter term.

In *Carmichael* v. *Liverpool Ship-owners' Association*, 19 Q. B. D., 242, Lopes, *J.*, in defining improper navigation, said at page 251:

> "In my opinion *improper navigation* means the *improper management* of a ship in respect of the cargo during the voyage."

In *The Ferro* (1893), Probate, 38, where the bill of lading contained an exemption for loss from neglect "in the navigation or management of the ship," Sir Gorrell Barnes said (p. 46):

> "I think it is desirable also to express the view which I hold about the question turning ing on the construction of the words 'management of the ship.' *I am not satisfied that that they go much, if at all, beyond the word 'navigation.'* Some things may be suggested to which the word 'management' is perhaps applicable beyond that of 'navigation,' but I feel that it is not such clear and expressive

> language as to include within it the words 'improper stowage.' *It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of cargo.*"

In *The Glenochil* (1896), Probate, 10, Sir Francis Jeune (at page 16) again expressed the opinion that the word "management" went somewhat, but not much, beyond "navigation," and expressly reaffirmed the decision in *The Ferro*, "that mere stowage is an altogether different matter from the management of the vessel."

To what extent then should the word "management" be held to cover and include acts or omissions not properly comprehended within the term "navigation?" The learned District Judge in his opinion in this case has pointed out so clearly the test to be applied, that it is difficult to add to what he has there stated (p. 47):

> "The handling of the ship's appliances with reference to the navigation or the safety of the ship for the purposes of the voyage, belong to the management of the ship."

To the same effect is the language of Sir Francis Jeune in *The Glenochil* at page 16, holding that "management" included a "class of acts which do not affect the sailing or movement of the vessel but do affect the vessel herself," and laying down the distinction between "want of care of cargo and want of care of vessel *indirectly* affecting the cargo."

As pointed out by the District Judge, the negligence in this case was in respect to the cargo alone; the navigation of the vessel, her safety, the prosecution and completion of the voyage, were in no way affected by the change in her trim; she herself was in as seaworthy a condition by the head as if trimmed by the stern, and there was no misuse of any part of the ship's appliances or failure to use the appliances furnished by the owner.

In the cases in which shipowners have been held

entitled to exemption under the statute, one or more of the above mentioned elements have been present.

In *The Silvia*, 171 U. S., 462, this Court held that "Navigation and management" included "the "control during the voyage of everything with "which the vessel is equipped for the purpose of "protecting her and her cargo against the inroad "of the seas; and if there was any neglect in not "closing the iron covers of the ports, it was a fault "or error in the navigation or in the management "of the ship."

In *The Sandfield* (79 F. R., 371; 61 U. S. App., 385), a leak was occasioned by sea perils, and the crew failed to open a sluice gate provided for the purpose of emptying the bilges. It was held that "the opening of valves, sluices and ports during the voyage is a part of the management of the ship."

In the *Mexican Prince* (82 Fed. R., 484), a valve in a cargo compartment of a tank steamer was negligently opened during the operation of discharging ballast water from an adjoining and connected compartment during the voyage.

In *The British King* (89 F. R., 872) there was neglect in sounding and using the pumps to free the vessel from water taken in through a leak in heavy weather, and the failure to take soundings and apply the pumps was held to be negligence in management of the ship.

In the *Etona* (64 F. R., 880; 38 U. S. App., 50) both Courts found that there was no negligence in stowage. The Harter Act was considered only as affecting the question of liability for the stranding of the vessel which was claimed to have been caused by negligence of the pilot. What was said in respect to the application of the Harter Act in that case is, however, adverse to the appellant's contention, the Circuit Court of Appeals holding that, in case the stranding was due to the pilot's negligence, "the third section of the Harter Act protects the ship against libelant's claim, *since there has been*

no negligence, fault or failure in loading or stowage."

In the *Glenochil* (1896), Probate, 10, the engineer negligently omitted to ascertain the condition of the sounding pipe and casing, which had been broken by heavy weather during the voyage, before running water into a ballast tank, the water damaging the cargo. The bill of lading incorporated the Harter Act and the Court held that the damage resulted from "fault in management." The decision was however expressly based upon the fact that the negligent act was one done for the safety of the ship herself, and not primarily in connection with the cargo, the distinction made by the learned District Judge in the case at bar being clearly and explicitly recognized.

Sir Francis Jeune (p. 14).

> "It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening her arising because part of her cargo had been taken out of her." * * * *
> "No doubt the object of S. 1 is in terms to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary sense, any mismanagement of the ship in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by S. 3 to exempt from liability for damage or loss resulting from faults or errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo."

Gorrell Barnes, *J.*, in considering the several sections of the Act, said (p. 19):

> "But I think if those sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'"

On the other hand in The *Ferro*, *supra*, the stowage of rotten oranges with sound ones and placing sound boxes so that their ends rested on angle irons and were broken by pressure, was held not to be a fault in "navigation or management."

In The *Whitlieburn*, 89 Fed. Rep., 526, the District Judge held that "fault in management of the vessel" did not cover and include the stowing and ballasting of a light cargo in such a manner as to render the vessel crank and topheavy, and that the third section of the act did not exempt the shipowner from liability for loss resulting from a consequent jettison.

(*c.*) To extend the meaning of the words "management of the vessel" to cover and include negligence in the care of the cargo would violate the intention of the act as a whole.

The uniformly acknowledged and established principle in the interpretation and construction of statutes, that every part of an act is to be taken into consideration for the purpose of discovering the intention of the legislature, and that, where particular provisions are contained in it, the construction of general words is not to be extended to nullify the more particular provisions, requires that the general

words contained in the third section should not receive an interpretation which would contradict the particular intent of the first and second sections.

The first section of the Act declares it unlawful to insert any provision whereby the ship-owner "shall be relieved from liability for loss of damage resulting from negligence, fault or failure in proper loading, stowage, custody or care" of cargo.

The second section declares it unlawful to insert any agreement "whereby the *obligations* of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in anywise be lessened, weakened or avoided."

While admitting and recognizing the rule of interpretation above stated, the appellant contends that the exemption for faults in management is explicit, while the liability of the ship-owner as respects the matters enumerated in the first and second sections is not defined but is matter of inference only; and that the proper application of the rule, therefore, requires that the language of the third section should prevail. (Appellant's Brief, p. 40.)

The language of the first and second sections is so express, however, as to exclude all necessity for *inference*. "Liability for loss or damage" is the language of the first section, strengthened, if there be necessity therefor, by the language of the second section—the "*obligations of* the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly handle and deliver the same."

It is submitted, therefore, that to include negligence in the care of the cargo within the term "management of the vessel" as used in the third section, would be repugnant to the manifest intention of the Act to make the ship and owner responsible for such neglect.

The contention that it was the intent of Congress to absolve the ship-owner from liability for failure

of his officers and crew in everything within the scope of their duties from the time the cargo comes on board until ready for delivery at its port of destination is also clearly negatived by the language of the second section, expressly covering the acts of "master, officers, agents or servants" in respect to duties and obligations necessarily arising after the receipt of the cargo on board.

LAST POINT.

The decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,
LAWRENCE KNEELAND,
Counsel for Botany Worsted Mills,
Appellee.

No. 32.

Brief of Mynderse for Respondent

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Oct. 10, 1899.

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JAMES H. McKENNEY
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JAMES KNOTT,
Respondent and Appellant,

against

THE BOTANY WORSTED MILLS,
Libellant and Appellee.

No. 32.

JAMES KNOTT,
Respondent and Appellant,

against

HENRY P. WINTER and CHARLES F. SMILLIE,
Libellants and Appellees.

Brief for Libellants Winter and Smillie.

The above entitled causes come before the Court under a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit (*Rec., p.* 57).

The libellants were the consignees of thirty-nine bales of wool shipped on the steamer *Portuguese Prince* at Buenos Aires for delivery in New York. The bales were shipped in good order, but when delivered to the libellants at destination thirty-seven bales had been damaged by drainage from sugar.

Winter & Smillie, the libellants, filed a libel in the District Court of the United States for the Southern District of New York against the respondent James Knott, as the owner of the steamer, to recover the amount of damage to the wool. Their libel was sustained and a decree was entered in their favor. Another shipment of wool, consigned to the Botany Worsted Mills, was damaged to the extent of fifty-two bales, and a libel was filed by the Botany Worsted Mills in respect of such damage. That libel also was sustained.

The actions were tried together in the District Court, and the decrees entered in the District Court were upon appeal affirmed by the Circuit Court of Appeals.

The *Portuguese Prince* was a British steamer, and belonged to the Prince Line. This line traded between New York, Brazil and the River Plate, touching at some islands of the West Indies. The line had resident agents in each port, and a resident superintendent in New York (*Saunders, pp.* 25, 26). It was established in 1892, and its steamers were carriers of general merchandise, receiving and delivering cargo at each port (*Saunders, pp.* 25, 26).

The advertisements of the steamers were under the general name of the Prince Line.

A specific admission was made upon the trial that the steamer was a common carrier (*Rec., p.* 14).

The sugar, from which the drainage came, and also both consignments of wool, were stowed in the between-decks forward of the engine-room. This compartment was about eighty feet in length, and about thirty-four feet wide (*Saunders, pp.* 20, 24–25).

The compartment was, on this voyage, divided by a transverse temporary wooden bulkhead, which stood about in line with the foremast, and divided the compartment about equally (*Saunders, pp.* 16–17). The dividing bulkhead was not a part of the original construction of the vessel, but was movable, and, in fact, was moved about to suit the convenience of cargo (*Saunders, p.* 27). There were doors in it (*Saunders, p.* 17).

The wool was stowed in the division which was forward of the temporary bulkhead, and ran from the forward

part of the compartment to within ten feet of the temporary bulkhead (*Saunders, pp.* 16–17).

The bales were stowed on end, nine in a row, and from the size of the bales there must have been about ninety in that compartment (*Saunders, p.* 17). There were eighty-nine bales damaged, and Mr. Saunders is therefore in error when he says only three rows were damaged (*Saunders, p.* 22.) The wool appears to have been dunnaged (*Saunders, p.* 17).

After leaving Buenos Aires, the steamer proceeded to Santos, Rio, Bahia, and Macio and then to Pernambuco, at which port two hundred tons of crude green sugars were put in the between-decks in the division abaft the temporary bulkhead. The sugars were wet and were expected to drain heavily (*Saunders, pp.* 16, 22). They were a character of cargo ordinarily taken by the steamers of the line (*Saunders, p.* 27).

The construction of the *Portuguese Prince* was such that if she were on an even keel the drainage would run aft. With a trim of six inches by the head, the drainage would still run aft so long as she was stationary, but moving through the water she would, in such trim, and with her natural tendency to dip, carry the drainage forward (*Saunders, p.* 20).

When the steamer left Pernambuco, after loading these sugars, she was trimmed ten inches by the stern, and upon arrival at Para, which was the next port, she was still trimmed by the stern (*Exhibit D, p.* 29). She lay at Para ten days discharging cargo, and when she left Para she was trimmed two feet by the head (*Exhibit D, p.* 29). She carried this trim upon arrival at the next port, Port of Spain, Trinidad, but during her two days' stay there, her trim was corrected, and when she left that port she was trimmed one foot by the stern (*Exhibit D, p.* 29).

There was no cargo stowed between the wool and the temporary bulkhead, nor was there any cargo stowed between the sugars and the temporary bulkhead.

It has been formally admitted that the wool was damaged by drainage from the sugars finding its way forward through the temporary bulkhead at Para, or between Para

and Port of Spain, the drainage being carried forward by the trim of the vessel (*Exhibit A, p.* 28).

Bills of lading were signed and issued by the resident agents at the port of shipment (*Exhs., p.* 28). The resident agents at each port engaged freight and attended generally to the vessel's business (*Saunders, p.* 26).

The appellant seeks relief:

1st. Under a claim that he is entitled to have the contract construed in accordance with the law of Great Britain, and that the contract when so construed relieves him from liability.

2d. Quite inconsistently, that the provisions of the Harter Act relieve him from liability.

POINTS.

First.

THE LIBELLANT CANNOT FIND RELIEF UNDER THE BRITISH LAW.

A. The Court, before it determines whether the British law is to govern the contract of carriage, will first inquire whether the contract, if construed under the British law, would relieve the shipowner from liability.

Compania la Flecha vs. *Brauer*, 168 *U. S.*, 104, 118.

Foreign law must be pleaded and proved.

Liverpool Steamship Co. v. *Phenix Ins. Co.*, 129 *U. S.*, 397, 445, 446.

The only proofs in the case as to the state of the British law is found in the libellant's answers to interrogatories, in which the libellant states that he

> "is informed and believes that some English courts
> "have held that under the laws of England the
> "owners of vessels are permitted in England to
> "make contracts which exempt them from liability
> "for the negligence of their servants in loading,
> "stowage and carriage of goods" (*Rec., pp.* 7, 8).

There are no proofs that the British law would relieve the shipowner from liability in respect of general acts of negligence or default on the part of the master or mariners, as claimed by the appellant in the first point of his brief.

Indeed it can scarcely be contended that the proofs are sufficient to establish that the British law would sustain a contract by which the shipowner was specifically relieved from the consequences of negligent stowage on the part of his servants.

Moreover, assuming that the damage to the wool was due to bad stowage, by which the drainage from the green sugars ran to the wool, there are no terms in the bill of lading which purport to exempt the shipowner from liability for such damage.

The words which are pleaded in the answer of the appellant are:

> "and all damage arising *from* the goods by stowage or contact with, or by sweating, leakage, smell or evaporation *from* them" (*Rec., pp.* 4, 11).

Plainly these words do not purport to relieve the shipowner from liability for damage *to* the goods from other goods.

Indeed they are so far away from the mark that the appellant's counsel forcibly changes the word "from" to "to," although this Court has said:

> "Exceptions in a bill of lading or charter-party
> "inserted by the shipowner for his own benefit
> "are unquestionably to be construed most strongly
> "against him."
>
> *Compania la Flecha* vs. *Brauer*, pp. 104, 118.

The appellant, instead of seeking the construction of the words most unfavorable to him, is not even satisfied with

the most favorable construction which can be given to the words, but in order to get any relief from the provision must perforce change the language.

It does not rest upon the consignees to determine just what the shipowner had in mind when he inserted the provision which appears in the bill of lading.

It does not rest with them to establish that the provision has *any* meaning. It may be suggested, however, that the provision as it appears in the bill of lading was drawn by the shipowner with a view of covering the classes of damage referred to in the case of Ohrloff *vs.* Briscal (*The Helène*), *L. R.*, 1 *P. C.*, 231.

In that case certain bales of wool were damaged through leakage from casks of oil. The leakage of the casks was induced by heat generated by the bales, which dried the staves of the casks. The damage to the bales may therefore be said to have sprung from the bales themselves. For such character of damage the class which actually appears in the bill of lading would be in a measure appropriate.

Moreover it may fairly be said that even under the altered phraseology which the appellant's counsel adopts, the present case would not be covered. The words "bad stowage" are not quite appropriate to describe the situation of the cargo on the *Portuguese Prince*. Indeed the counsel for the appellant himself, in another branch of his brief, asserts that the faulty conditions which led to the loss are not to be deemed "faults in stowage" (*Appellant's Brief, p.* 38).

The other words of the bill of lading "or from the leakage or flow of or from contact with the urine, manure, water, or drainage of horses, cattle, sheep or other animals, &c.," are clearly inaplicable to the present case.

There being no proofs that the British law would relieve the shipowner from liability for the general unspecified acts of negligence of his servants, and it appearing that the bill of lading contained no provisions applicable to the case, we submit that it is unnecessary to determine whether or not the appellant is entitled to have his contract construed in accordance with the laws of Great Britain.

B. There is no valid provision in the bill of lading subjecting the contract to the law of Great Britain.

Such subjection is claimed by the appellant under the clause of the bill of lading, which provides:

"This contract shall be governed by the law of the flag "of the ship carrying the goods."

The appellant claims that the law of the flag is the British law, and that by such law, the clause exempting him from responsibility for stowage is valid.

But by the first section of the Harter Act, the exemption clauses relied upon are declared null and void, and there is materially nothing therefore upon which the British law, if applicable, and if proved, could take effect. The stipulation, however, for the application of foreign law is invalid.

Lewisohn v. *National S. S. Co.*, 56 *Fed. Rep.*, 602;
The Silvia, 68 *Fed. Rep.*, 230, 231;
The Glenmavis, 69 *Fed. Rep.*, 472, 476;
The Brantford City, 29 *Fed. Rep.*, 373, 396;
The Hugo, 57 *Fed. Rep.*, 403, 411;
The Etona, 64 *Fed. Rep.*, 880;
The Guildhall, 58 *Fed. Rep.*, 796;
The Energia, 56 *Fed. Rep.*, 124, 127, *and* 66 *Fed. Rep.*, 604;
The Iowa, 50 *Fed. Rep.*, 561.

If the Harter Act is not considered controlling then the the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Co. vs. *Lockwood*, 17 *Wallace*, 357, 380, 382.

While it might be "just and reasonable" to apply the British law, under a properly framed stipulation therefor, in respect of cargo destined for England, it is not "just or reasonable" to make it applicable to the transportation of cargo from South America to the United States.

It might be "just and reasonable" to provide that the contract should be regulated by the law of the port of shipment, where the relations of the ship and shipper begin; or it might be "just and reasonable" to provide that the contract should be regulated by the law of the port of destination, where the relations of ship and shipper terminate; but it is unnatural, and therefore unjust and unreasonable, to forcibly subject a contract of carriage to the laws of a country foreign both to the port of shipment and the port of delivery.

The stipulation for the law of the flag does not, moreover, fairly and explicitly introduce the British law. The bill of lading provides:

> "The company reserves the liberty *before shipment* or at any subsequent period, and so often as may for any cause be deemed expedient at any place to ship the whole or any part of said goods by *any other steamer* or vessel *whether belonging to the company or not.*"

And then provides:

> "This contract shall be governed by the law of the flag of the ship *carrying* the goods."

It cannot be said that a shipper, receiving such a bill of lading, has made an enforcible stipulation for the application of British law. The bill of lading does not specify the law of any named nation. While shipment was contemplated on a British vessel, the right was reserved to the shipowner, *before shipment* or afterward, of shipping the cargo on any other steamer, of any owner, and of any flag, without notice to the shipper. The shipper could not know the nationality of the *carrying* vessel and cannot be deemed to be bound to the law of its flag.

Such a stipulation is not "just and reasonable in the eye of the law."

Second.

THE HARTER ACT DOES NOT RELIEVE THE SHIPOWNER.

The first section of that act prohibits the insertion in a bill of lading, of any clauses, covenants, or agreements, relieving the manager, agent, master or owner of any vessel transporting merchandise between ports of the United States and foreign ports, from liability for loss or damage through negligence or omissions in loading, stowing, *caring for* or delivering cargo, and declares that all such clauses shall be null and void.

The second section prohibits the insertion in any bill of lading, of a covenant or agreement whereby are lessened, weakened or avoided the obligations of an owner to make his vessel seaworthy, or the obligations of a master, or agent to carefully handle and stow and *care for* and deliver cargo.

The third section relieves the shipowner who has exercised due diligence, from responsibility for damage resulting from faults or errors in navigation or management of the vessel.

The Act must necessarily be construed as a whole and the stringent provisions of the first and second sections indicate that the responsibility is left upon the owner of properly stowing and "caring for" the cargo, and that he is relieved from responsibility for damage to cargo only when it comes through navigation and management of the vessel when she is at sea and beyond his control. It is not enough that the cargo be originally stowed in a place of temporary safety. The obligation upon the owner is a continuing one. He cannot relieve himself from responsibility for the "custody" and "care" of the cargo. (*Section* 1.) Nor can he relieve himself from the obligation to "care for" it. (*Section* 2.)

These provisions contemplate not only that the cargo shall be well stowed originally but that due provision shall be made from the outset and shall be continued wherever practicable to maintain it in safety.

The analytical criticism of appellant's counsel, in his effort to show that the provisions of sections one and two

do not apply to bills of lading issued in a foreign port, is not pertinent to the case. Even if we assume that the Act does not prohibit such insertion of the negligence clauses and that they are therefore not "null and void " through the operation of the statute," it is clear that in the light of the proved negligence of the shipowner and his servants, the clauses do not afford him protection.

R. R. Co. vs. *Lockwood*, 17 *Wallace*, 357, 380.

Liverpool Steamship Co. v. *Phenix Ins. Co.*, 129 *U. S.*, 397, 438.

When the entire cargo of a vessel is taken at one port, the cargo must at least be properly stowed at the time it leaves port, and it must have all proper surroundings for its protection through the voyage.

When the cargo is loaded in partial lots at successive ports the obligation of good stowage is a recurrent one arising at each port.

It may be admitted that the wool was put on at Buenos Aires suitably dunnaged, to protect it from the dangers then existing We urge, however, that the owner failed in his duty when, at Pernambuco, he placed substantially in the same compartment with the wool, two hundred tons of wet sugars, with full knowledge that such sugars would drain and that the cargo of wool was protected in respect to such drainage only by the temporary trim of the vessel by the stern. The bulkhead between the wool and the sugar was no protection, and it was not intended to be a protection. So far as it afforded any appearance of protection to the wool, it was a delusion.

The owner, the master, and the agent all knew that the bulkhead was only temporary in its character, and that it was shifted from place to place to meet the emergencies of loading, and that it had doors.

They were bound to contemplate that through the pitching of the vessel at sea, the sinking of her head while ploughing through the waters (*Saunders, p.* 20), or by the shifting of weights through receipt or discharge of cargo at later ports, the trim would be from time to time

changed, and that thereby the drainage might be thrown forward.

It was negligence to place the wet sugars in close promimity to the wool, with no other protection for the wool than the temporary trim of the vessel.

It happened that no damage came to the wool at Pernambuco, nor until after arrival in Para ten days later. While at Para the trim of the vessel was so changed, through discharge of cargo, as to send her out from that port nearly two feet by the head, which trim was subsequently maintained for six days, and until after reaching Port of Spain, Trinidad (*Exhibit D, p.* 29).

If the word "seaworthy" relates purely to the condition of the hull, it must certainly relate to the condition of the hull for the purpose of its contemplated use. In that aspect, the bulkhead did not make the vessel seaworthy for the transportation of wet sugars and dry wool in the forward between-decks.

But unseaworthiness may relate to a condition of loading as well as to a condition of the hull.

Carver Carriage by Sea, Second Edition, Section 18.

The stowage of the wool and the responsibility of the owner in respect thereto was not disposed of by putting the bales in a dry place and fairly dunnaged at Buenos Aires. The stowage of the wool was changed at every port, not by physical removal of the wool, but in its surroundings.

Certainly it could not be said that the shipowner had discharged his responsibility in respect to the stowage and care of the wool by putting it on a dry deck well dunnaged at Buenos Aires, if at the next port he had put on it wet and draining cargo.

The position of the shipowner under the Act is partly defined in the *Sylvia* (171 *U. S.*, 462, 465). In order to secure exemption from the consequences of errors in "navigation" or "management" the shipowner must "exercise due diligence to make the vessel in all respects

"seaworthy and properly manned, equipped and sup-
"plied." This is a duty which falls upon the shipowner in port, and which he must thoroughly perform in each port.

Can it be said that the *Portuguese Prince* was properly equipped and supplied for the transportation of general cargoes under the many conditions which would arise at her numerous ports of shipment and discharge, when she was equipped only with an open and movable bulkhead to separate the classes of cargo which would probably be shipped and which would involve such danger to each other?

The case of the *Sylvia* intimates that the acts for which the shipowner may be relieved are acts of "navigation" or "management," at sea only, and not in port.

The phraseology of the statute carries the same import, in that it implies that it is only the faults or errors of the officers and crew of the vessel in respect to which exemption is given. The exemption is given to the "owner "or owners, *agent*, or charterers." It is not given to the owner in respect of the acts of his agent, nor in places where he or his agent can, by diligence, guard against losses.

The present case differs from that of the *Etona*, 71 *Fed. Rep.*, 895. In that case the list was given to the vessel through negligent stranding and while in charge of a pilot, while the *Portuguese Prince* took her trim while in port, a place where the shipowner was represented by an agent. She took a trim which might have been contemplated and which could have been corrected either by the use of her water ballast tanks or by a re-arrangement of cargo (*Saunders, fols.* 128, 129).

Recent English cases are fully discussed in the opinion of the District Judge—

The Glenochil (1896) *Probate Division* 10.
The Ferro (1893) *Probate Division* 38.
See also *Dobell against S. S. Rossmore Company*, (1891) 2 *Q. B.* 408.

In this latter case t he shipowner was held to be respon sible for due diligence on the part of himself and his agents "to make the ship seaworthy *when she starts,*"

Third.

IT IS RESPECTFULEY SUBMITTED THAT THE DECREES OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Smillie & Winter.

WILHELMUS MYNDERSE,
Advocate.